Filed 3/30/05 In re J.B. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J. B. et al., Persons Coming Under the Juvenile Court Law.	B175127 (Los Angeles County Super. Ct. No. CK38906)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. VALERIE S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Juvenile Court Referee. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond Fortner, County Counsel, Larry Cory, Assistant County Counsel and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Appeal from March 22, 2004, order of the juvenile court summarily denying appellant's Welfare and Institutions Code,[1] section 388 petition which requested the reinstatement of court jurisdiction and the placement of the minors in her care. We find that appellant did not make the required prima facie showing to require the hearing and affirm order of the juvenile court.

COMBINED STATEMENT OF THE CASE AND FACTS

The children came to the attention of the court on August 18, 1999, when their aunt, K. B. observed the minors to be malnourished and suffering from several visible injuries. She took the children to the hospital where staff observed that J., then age three, had several healing marks on her face, stomach and back. She also had what appeared to be an adult bite mark on her stomach, and a possible cigarette burn on her right buttock. D., then age one, had more numerous abrasions and bruises including a scabbed laceration on her eyelid, and marks reminiscent of a belt buckle. Both minors had specks of white discolored tissue on their buttocks, and liver enzyme tests suggested that the children had been sprayed on their buttocks with some type of chemical. Both minors appeared listless, and were described as near failure to thrive. D. had to be hospitalized.

On August 20, 1999, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition under section 300 on behalf of J. and D. The petition alleged that the minors came within the provisions of section 300, subdivisions (a), (b), (e), (g) and (i). The juvenile court found that prima facie evidence existed to support the

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

Department's petition and the minors were formally detained. On August 23, 1999, the juvenile court detained the children with their aunt. The court also ordered monitored visits for Mother.[2]

DCFS conducted an investigation and interviewed appellant. She denied the allegations and offered a variety of explanations as to how the children received their injuries. Appellant's grandmother indicated that appellant had a "problem with nerves," and probably "popped" them. When J. was interviewed, she confirmed that her mother had bitten her.

A follow-up medical evaluation, by Dr. Carol Berkowitz, concluded: "both J. and D. have physical evidence of undernutrition and physical abuse. There was no other medical explanation for these findings. Further evidence of environmental neglect would be provided by current weights if these demonstrated appropriate growth including catch up growth which occurred in a simple change in the home without other intervention." While living with the aunt, the children thrived and attained appropriate height and weight for their ages. DCFS attempted to obtain a psychological exam of appellant, but was unsuccessful after mother missed several intake interviews.

DCFS recommended that appellant be denied reunification services pursuant to section 361.5, subdivisions (b) (5) and (6).

Appellant's trial counsel gave birth prematurely and the jurisdictional hearing was continued several times. On March 6, 2000, appellant was appointed a new attorney and, on March 21, 2000, the court declared a mistrial. On March 21, 2000, DCFS reported that mother had been prescribed Zoloft for depression and Zyprexia for delusions and hearing voices. Medical personnel had not been able to ascertain the success of the medication because appellant did not return for follow-up appointments. The court appointed Dr. Ronald Fairbanks under Evidence Code section 730 to conduct a psychological evaluation of Mother.

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[2] The biological fathers of J. and D. are not involved in this appeal.

On March 28, 2000, after beginning a new trial, the court sustained a slightly amended petition, and found the minors came within the provisions of section 300, subdivisions (a), (b) (e) and (i).

On May 2, 2000, DCFS reported that appellant was receptive to DCFS services. She completed a parenting class and was scheduled to begin individual counseling. Both relatives and DCFS social workers commented on appellant's changed attitude and positive progress. Appellant also visited the children regularly and displayed appropriate affection and patience during those visits. Appellant and children were strongly bonded to each other.

Attached to the May 2, DCFS report was the 730 evaluation by Dr. Fairbanks. Dr. Fairbanks reported to the court that appellant was lucid during the examination, but often contradicted herself. She accepted no blame for what had happened to the children due to antisocial values, low frustration tolerance, selfishness, narcissism and impulsivity. Further, given the medications she was prescribed, appellant was mostly likely schizophrenic. Dr. Fairbanks recommended against returning the minors to appellant because it was his opinion that reunification services would not be successful and there was a high likelihood that the children would be abused again.

Dr. Fairbanks also indicated that appellant would require a significant amount of treatment and a further evaluation before the children could safely return to her custody. He recommended that all visits be monitored by a professional monitor to ensure the children's safety. Regarding reunification, Dr. Fairbanks opined that, given appellant's psychological test scores, the chances of rehabilitation were minimal, and therefore, even with the reunification plan in place, the likelihood that the children could successfully return to her care at a later date was unlikely. He recommended that appellant participate in weekly psychotherapy in conjunction with psychiatric monitoring of her medication regiment. Dr. Fairbanks concluded that he was not particularly optimistic regarding appellant's possible improvement or reunification. Consequently, DCFS recommended against reunification services for appellant.

By June 5, 2000, DCFS was still recommending against reunification services for appellant, citing the observations of Dr. Fairbanks, specifically appellant's antisocial and sociopathic profile in support of their recommendation. DCFS acknowledged that appellant had always been the children's primary caretaker and that the children were bonded to her. The report indicated that mother continued to visit regularly and the children enjoyed the visits and were upset when they ended. Nevertheless, DCFS recommended against reunification services for mother.

On June 26, 2000, the court ordered the Department to prepare a case plan for appellant and the dispositional hearing was continued to August 1. In the report prepared for the August 1, hearing, DCFS reported that appellant had tested negative for illicit substances. Mother reported her attending one counseling session and had scheduled to attend another. However, appellant could not provide the name of her therapist or the date of her next appointment. Mother insisted that she had completed a parenting class, but that the information could not be verified by DCFS. The children's aunt reported that visits continued to go well and she believed that appellant deserved an opportunity to have the children returned to her.

On August 1, 2000, despite DCFS's recommendation, the court ordered that reunification services continue. Specifically the court ordered appellant to participate in weekly psychotherapy, cooperate with her psychiatrist regarding medication and submit eight clean drug tests. The court noted that Mother had already completed a parenting class. The court continued the case to January 30, 2001, for a six month review hearing.

On October 11, 2000, DCFS filed a section 387, supplemental petition because the aunt could no longer care for the children due to conflicts with Mother. According to the aunt, Mother called often and the children acted defiantly after they spoke to Mother. On November 6, 2000, the section 387 petition was granted and the minors were placed in foster care.

Also in October 2000, appellant was arrested for charges relating to the abuse of the children. She remained in jail until December 13, 2000. Prior to the arrest, appellant

was participating in parenting classes and counseling, submitting clean drugs tests, and visiting the children. However, mother's arrest prevented her from completing any of the court's orders. During her incarceration, DCFS ensured that appellant received four-hour, monthly visits with the children.

The six-month review hearing was continued two times. Before the review hearing, DCFS reported that appellant was complying with the terms of her case plan, and recommended that reunification services be continued another six months. On March 12, 2001, the six month review hearing was finally held and the court, finding that it could not safely return the children to appellant, extended reunification services for another six months. At that hearing, a report from the DCFS reported that appellant had only participated in one counseling session since her release from jail in December 2000, and that despite the court allowing unmonitored visitation since February 2001, appellant had only arranged to see the children one time.

At the September 10, 2001, 12-month review hearing, DCFS reported that the children remained placed in foster care. They also reported that appellant was not attending therapy regularly. She attended one session with her first therapist, one with her second, and one with her third, and failed to attend any follow up appointments. Mother told the third therapist that she had done nothing wrong and that her family had lied about her. Because appellant failed to progress in her individual therapy, DCFS recommended that reunification services be terminated. In the meantime, the minors continued to be physically healthy and demonstrated no developmental or emotional problems. Appellant and minors enjoyed regular visits, and the visits were liberalized to be unsupervised.

After several continuances the 12-month review hearing was conducted on November 5, 2001. After a contested hearing, the juvenile court terminated reunification services and set the matter for March 4, 2002, for a section 366.26 hearing to select and implement a permanent plan for the children.

In February 2002, appellant filed her first section 388 petition requesting reinstatement of reunification services, claiming that as of January 24, 2002, she was attending counseling regularly. The court denied the petition without a hearing.

At the March 4, 2002, section 366.26 hearing, DCFS reported the mother continued having monthly, unmonitored visits with the children. The current caretakers wanted to assume legal guardianship over the children. Given the children's close bonds with the mother, DCFS believed a plan of guardianship, in lieu of adoption, was appropriate. The children expressed loving their Grandma and Papa, the terms they used to describe their foster parents. Accordingly the court appointed the foster parents as the children's legal guardians and issued letters of guardianship.

At the review hearing on August 27, 2002, DCFS reported that in January 2002, Mother was incarcerated for forgery. She was scheduled for release in October 2002. During her incarceration mother had no face-to-face contact with the children, but called and sent letters monthly. Meanwhile, the children continued to thrive in their placement. With the agreement of the foster parents and DCFS, the court terminated jurisdiction over the matter with the children remaining in legal guardianship.[3]

Around October 26, 2002, appellant was released from jail. After her release, she participated in counseling. Appellant resumed visits with the minors and the foster parents reported that the minors continued to be excited for the visits.

One and one-half years later, on February 23, 2004, appellant filed a second section 388 petition, requesting reinstatement of jurisdiction, custody of the children, or in the alternative, weekend overnight visitation and a re-evaluation of appellant's progress. In support of the petition, appellant stated that she attended counseling and visited the children regularly. She also attached a letter from the foster mother stating

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[3] The minute order of August 27, 2002, provides: "Jurisdiction is terminated as to the minor[s] subject to further proceedings re financial responsibility per [Welfare and Institutions Code section] 903."

that the visitation between mother and the children had been going well; the children remain bonded to their mother and that she felt appellant should be given a second chance with the children.

On March 22, 2004, the juvenile court summarily denied appellant's petition on the ground "the best interest of the minors would not be promoted by the proposed change of order." The court found that the petition failed to state facts to support the allegations, failed to state new evidence or changed circumstances and failed to show how the requested modifications would promote the children's best interests.

On May 7, 2004, appellant filed a notice of appeal seeking relief from the juvenile court's denial of her section 388 petition.

DISCUSSION

Appellant contends that "prima facie evidence supported [her] request for an evidentiary hearing on her section 388 modification petition and the juvenile court erred in summarily denying it." She also contends that "[b]y the time she filed her 388 petition on February 23, 2004, her participation in counseling evinced a change of circumstances sufficient to meet the prima facie requirements to trigger an evidentiary hearing." In her opening brief she states that the return of the children to her custody was in their best interests because:

> "Appellant had a great relationship with her children. During the reunification period appellant consistently visited the minors, and was observed to display appropriate affection and patience during visits. . . . The minors affectionately addressed appellant as 'mama' did not want to leave after visits, and were strongly bonded to her. . . . Indeed, the bond the family shared was so strong that the court opted for a plan of legal guardianship instead of the typically preferred plan of adoption.
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> "By the time of appellant's section 388 petition in March 2004, that relationship had only grown stronger. The letters of the legal guardians asking the

court to consider returning them minors to appellant's care are telling on that score."

Further, the foster parent's observations and opinions were "compelling evidence of the benefit of appellant's proposed modification request and should have triggered an evidentiary hearing on the issue."

The trial judge dismissed the petition without an evidentiary hearing. The minute order dated March 18, 2004, provides that the section 388 petition is denied and "Jurisdiction terminated on 8-27-02 remains in effect."

Appellant request for modification of the disposition of this case is governed by section 388 that provides, in pertinent part, that any parent of a dependent child of the juvenile court, "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of the court previously made . . . ." (§ 388.) Section 388 serves as an "'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*In re Kimberly F*. (1997) 56 Cal.App.4th 519, 528.) It "provides a means for the court to address a legitimate change in circumstances" to afford the parent one last opportunity to reinstate reunification services prior to final resolution of custody status. (*In re Marilyn H*. (1993) 5 Cal.4th 295, 309.)

To begin the process "[t]he parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.] We review the juvenile court's summary denial of a

section 388 petition for abuse of discretion. [Citation.]" (*In re Anthony W*. (2001) 87 Cal.App.4th 246, 250.)

Although a petition for modification should be liberally construed in favor of its sufficiency (*In re Daijah T*. (2000) 83 Cal.App.4th 666, 672), conclusory allegations are not sufficient (*In re Anthony W*., *supra*, 87 Cal.App.4th at p. 250.) If the matter proceeds to hearing on a motion for change of placement, "the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child. (§ 388; *In re Audrey D*. (1979) 100 Cal.App.3d 34, 45 [ ]; Cal. Rules of Court, rule 1432(f).) [¶] After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. [¶] . . . [¶] This determination was committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M*. (1994) 7 Cal.4th 295, 317-318.)

Appellant contends that the court erred because it did not hold a hearing on her petition. However, it does not appear the trial court abused its discretion in denying the request because appellant's petition did not make a prima facie showing regarding either prong of the test set forth in *In re Anthony W*. Regarding the change of circumstances and reason for the modification, appellant's petition provided in its entirety that, "[appellant] has completed all of her case plan. She still attends counseling with Dr. Conrad in San Bernardino. She visits the children on a regular basis and the Legal Guardian believes that the children should be reunited with [appellant]." The requested change of placement was in the children's best interest because "[t]he children want to

return to the [appellant]. [Appellant] can provide a safe and wholesome environment for the children." Respondent argues that appellant "failed to show changed circumstances or new evidence." Respondent notes that the "issues that prevented [appellant] from regaining custody were: that she failed to regularly attend psychotherapy to address deep-rooted psychological issues; she presented with psychotic features, which placed her at high risk of re-abusing her children; and she failed to admit to any wrong-doing with regard to why the children were taken into protective custody." Respondent argues that none of these issues were addressed in appellant's petition except to note that she was attending therapy.

We agree with respondent that appellant has failed to establish a prima facie case for a section 388 modification of placement and the trial court did not err in denying the motion without a hearing. It does not appear that appellant's petition made a prima facie showing regarding either prong of the test set forth in *In re Anthony W*. Appellant's petition notifies the court in extremely conclusory fashion that she has "completed her case plan," is "counseling with Dr. Conrad" and "visits the children on a regular basis." We do not believe this limited showing constitutes a "genuine change of circumstances." Aside from the fact that eighteen months passed since the children were formally placed in guardianship with the foster parents, there is not even a general description of the programs taken and/or completed and there is no verification of the participation in counseling and the success, or lack thereof, of that process. Additionally, even if appellant were to argue that the completion of some counseling is a change in circumstances, there is absolutely no showing in appellant's petition regarding the second prong of the test, i.e., that revoking the previous order would be in the best interests of the child. On the contrary, the record as it stands indicates that the children's best interests are met by continued placement in their foster home.

As required by law, the juvenile court in this case focused on the need for permanence and stability. (*In re Marilyn H.*, *supra*, 5 Cal.4th 295.) Appellant obviously has the love of the children and the support of the foster parent in her effort to increase

her contact with her children. She will need however, to keep in mind the showing she is required to make to the juvenile court in order for modifications to occur.

DISPOSITION

The order of the juvenile court is affirmed.

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COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.